

2012 IL App (2d) 100993-U
No. 2-10-0993
Order filed May 21, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-619
)	
VICTOR VARGAS,)	Honorable
)	Thomas E. Mueller,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

Held: The State produced sufficient proof of the corpus delicti of criminal sexual assault (penile penetration), in the form of evidence that defendant's semen was on the victim's vaginal swabs, and thus sufficiently corroborated defendant's confession.

¶ 1 After a jury trial, defendant, Victor Vargas, was convicted of three counts of criminal sexual assault based on committing three acts of sexual penetration—oral, digital, and penile—upon the victim, R.H., knowing that she was unable to give knowing consent. (720 ILCS 5/12-13(a)(2) (West 2008)). On appeal, defendant challenges the conviction based on penile penetration, contending that

the State failed to prove him guilty beyond a reasonable doubt, because his confession to the offense was insufficiently corroborated by evidence of the *corpus delicti*. We affirm.

¶ 2 We summarize the pertinent evidence at trial. R.H. testified as follows. At about 2 a.m. on February 24, 2009, she left work and drove to the Cadillac Ranch, a tavern. There, she recognized Gilberto Sanchez, a friend, who was sitting next to defendant. R.H. sat down on the other side of Sanchez and drank some alcohol. At about 3:30 a.m., she suddenly felt dizzy. She and Sanchez left the bar. Defendant had already left and pulled up in his truck to the front entrance. The three drove off to defendant's apartment in Elgin.

¶ 3 R.H. testified that, after entering defendant's apartment, she and Sanchez sat on the living room sofa and started kissing. Defendant walked around asking to join them, but R.H. and Sanchez repeatedly told him no. R.H. went to the bathroom, vomited, and lay on the floor. Sanchez entered and took her into defendant's bedroom.

¶ 4 R.H. testified that, after entering the bedroom, she and Sanchez engaged in consensual sex. She then fell asleep. When she woke up, she was lying in bed naked, with defendant, unclothed, putting his tongue into her vagina. She asked him where Sanchez was; he said that Sanchez had left. R.H. also recalled two things that happened before defendant put his tongue into her vagina. At one point, she briefly opened her eyes; saw defendant over her trying unsuccessfully to get an erection; and blacked out. At another point, defendant's fingers were in her vagina. R.H. never gave defendant permission to engage in sexual contact with her.

¶ 5 R.H. testified that, after the unwanted cunnilingus, she got dressed and collected her possessions. Defendant and R.H. walked to his truck, and he drove her back to her car at the

Cadillac Ranch. From her car, R.H. drove herself to the hospital. There, swabs were taken from her mouth and vagina.

¶ 6 Christine Kautz, the emergency-room nurse who examined R.H., testified that she collected evidence including a blood sample, an oral swab, and a vaginal-cervical swab. R.H. told Kautz about her consensual sexual acts with Sanchez and what she remembered about her nonconsensual sexual encounter with defendant. R.H. said that Sanchez had used a condom.

¶ 7 Elgin police detective Kevin Senne testified that, on February 26, 2009, he interviewed defendant at the police station. Defendant recounted that, at one point, he entered his bedroom, saw R.H. and Sanchez having sex, and asked to join in; they told him no. Later on, he drove Sanchez home, then returned and drove R.H. back to the Cadillac Ranch. After hearing this account, Senne accused defendant of leaving something out, and he asked defendant what else had happened. Defendant said that, after returning from dropping off Sanchez, he had sex with R.H. Senne asked defendant for clarification. Defendant “stated that he first placed his penis into her vagina, and that he later placed his mouth and fingers, finger into her vagina.” Defendant added that he did not use a condom. Senne asked what R.H.’s demeanor was during the sexual encounter; defendant said that R.H. did not appear to be coherent or awake at the time. Senne later obtained buccal swabs from defendant and Sanchez.

¶ 8 Cynthia Torrasi, a forensic biologist employed by a state police crime laboratory, testified as follows. On April 13, 2009, she received People’s group exhibit No. 24. Included in the exhibit were a blood standard (No. 24C); several vaginal swabs from R.H. (No. 24F); and swabs from R.H.’s supra pubic and labia majora (No. 24H). Torrasi tested People’s exhibit No. 24F for the presence of semen. She performed two indicator tests: a color test and a PSA-30 test. She then performed

a confirmatory test by taking a sample of the cellular material from the swabs and examining it with a microscope. Although both indicator tests were negative, the confirmatory test showed trace amounts of sperm. Torrasi preserved parts of the swab heads from exhibit Nos. 24F and 24H and preserved them for DNA testing elsewhere.

¶ 9 Heather Hayes, a forensic scientist who was employed by a state crime laboratory and qualified at trial as an expert on DNA analysis, testified as follows. In connection with this case, she received an exhibit labeled No. 1B1, vaginal swabs from R.H., and another exhibit labeled 111, the swabs from R.H.'s supra pubic and labia majora. She analyzed both exhibits for DNA. Hayes also received DNA standards from R.H., Sanchez, and defendant. Her analysis of exhibit No. 111 revealed a major female DNA profile that matched that of R.H. and a minor male profile that was consistent with defendant but excluded Sanchez. The analysis of exhibit No. 1B1 revealed a mixture of at least three people; specifically, there was a female profile that matched R.H.'s profile, and neither defendant nor Sanchez could be excluded as the source of either of the other two profiles.

¶ 10 The State rested. Defendant testified as follows. Early on the morning of February 24, 2009, he and Sanchez went to the Cadillac Ranch. R.H. sat down with them. At about 3 a.m., Sanchez suggested that they all go to defendant's apartment, and they did. Upon entering the apartment, Sanchez and R.H. sat on the sofa and defendant went into his bedroom. Shortly afterward, defendant entered the living room, saw Sanchez and R.H. both sitting naked on the sofa, and, at Sanchez's direction, returned to his room. R.H. went to the bathroom and got sick; Sanchez carried her out. At that point, Sanchez and R.H. said that they wanted to use defendant's bedroom, which he allowed them to do. Defendant sat in the living room. Eventually, Sanchez entered the living room and got

dressed. At his request, defendant drove him home. Before leaving, defendant looked into his bedroom and saw that R.H. was lying on the bed, awake.

¶ 11 Defendant testified that, upon returning after dropping off Sanchez, he saw that R.H. was still in his bed. With his underwear still on, defendant lay down on the bed. He asked R.H. whether they were going to have sex; she responded, “uh-huh.” He took off his underwear and she got on top of him. R.H. was pulling on defendant’s genitals to help him achieve an erection, but he could not do so. They turned over, and defendant put his tongue into R.H.’s vagina; when she told him to stop, he did. R.H. said that she wanted to leave, so they got dressed, and he drove her back to her car.

¶ 12 Defendant admitted that, on February 26, 2009, he admitted to Senne that he had put his tongue into R.H.’s vagina; had put his finger or fingers into her vagina; and had put his penis into R.H.’s vagina. Defendant testified that he lied about putting his penis into R.H.’s vagina, because he did not want the police to know that he could not achieve an erection.

¶ 13 In rebuttal, Senne testified that, in the interview, defendant never mentioned being unable to achieve an erection and never said that R.H. pulled on his genitals to help him achieve an erection.

¶ 14 The jury convicted defendant of all three counts of criminal sexual assault based on his knowledge that she could not give knowing consent. The trial court sentenced defendant to three consecutive four-year prison terms. He timely appealed.

¶ 15 Defendant contends that he was not proved guilty beyond a reasonable doubt, because a conviction may not rest solely on a confession and because the evidence *aliunde* his confession was insufficient to prove the *corpus delicti* of the offense. For the reasons that follow, we disagree.

¶ 16 In deciding on the sufficiency of the evidence, we ask whether all of the evidence, viewed in the light most favorable to the prosecution, was sufficient for a rational fact finder to find the

essential elements of the offense beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. However, a criminal conviction may not be based solely on an uncorroborated extrajudicial confession. *People v. Holmes*, 67 Ill. 2d 236, 240 (1977). There must be some evidence independent of the confession tending to show that the crime did occur. *People v. Phillips*, 215 Ill. 2d 554, 576 (2005). The corroborating evidence itself need not prove the existence of the crime beyond a reasonable doubt. *Id.* The confession and the corroborating evidence must be considered together to decide whether the defendant was proved guilty beyond a reasonable doubt. *Id.*

¶ 17 To prove defendant guilty, the State had to establish beyond a reasonable doubt that he committed an act of sexual penetration with R.H. and that he knew that she was unable to give knowing consent. 720 ILCS 5/12-13(a)(2) (West 2008). As relevant here, “sexual penetration” means “any contact, however slight,” between defendant’s sex organ and that of R.H. 720 ILCS 5/12-12(f) (West 2008)); *People v. Richmond*, 341 Ill. App. 3d 39, 45-46 (2003).

¶ 18 Defendant contends that, other than his admission to Senne, there was insufficient evidence that his penis made contact with R.H.’s sex organ. We disagree. Torrisi testified that the vaginal swabs taken from R.H. showed the presence of semen, albeit in trace amounts. Although Sanchez had intercourse with R.H. on the morning of February 24, 2009, Kautz testified that R.H. told her that he had used a condom. Defendant admitted that he had not used a condom. Thus, although we acknowledge that this is a close case, we conclude that the jury properly found beyond a reasonable doubt that defendant’s penis made contact with R.H.’s vagina.

¶ 19 Defendant speculates that, even if his semen made contact with R.H.’s vagina, it could have gotten there when he digitally penetrated her or when (according to his testimony) she attempted to help him achieve an erection. However, the corroborating evidence did not need to be sufficient by

itself to prove penile penetration beyond a reasonable doubt. See *Phillips*, 215 Ill. 2d at 576. It needed only provide sufficient ballast to defendant's confession to enable a reasonable jury to find guilt beyond a reasonable doubt.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 21 Affirmed.